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# A Long-Term Concern: Repealing the Rule Against Perpetuities

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# Agricultural Law Digest

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## A Long-Term Concern: Repealing the Rule Against Perpetuities

-by Neil E. Harl\*

We seem to be encountering all manner of unpleasant developments these days – bad weather, low commodity prices, disagreement in politics, the threat of rare infections and on and on. Some are comparable to what was encountered in our younger years and some appear, at least, to be targeting today's population. But one, in particular, seems to be yoked with actions that, at first blush, looks harmless but may be the most disruptive in the long run.

### Rule Against Perpetuities

The culprit was the repeal (or substantial amendment) in 31 states of a rule inherited from 17th Century England—repeal of the Rule Against Perpetuities.<sup>1</sup> The case involved disagreements among the heirs of the Duke of Norfolk over the propriety of leaving property in successive life estates. The disabled youngest son objected to his father leaving his substantial property to his eldest son for his life, then the second son for his life and then the youngest son outright. The youngest son argued that his disability probably meant that he would succumb at a relatively young age and inherit nothing and that successive life estates could well mean that he would die before his brothers and inherit nothing. The court agreed which set the stage for limits on how long property could be held in successive life estates.

### The United States version

That meant that property could not be held in successive life estates forever in the United States. In many states, the limit was that property could not be held longer than a class of selected lives plus 21 more years. In many of the states, the Rule has come to stand for the proposition that interests must vest, if at all, not later than 21 years after the last to die of a class of lives in being at the creation of the interest.<sup>2</sup>

All of the states had similar rules in place until the Governor of South Dakota broke ranks and convinced his legislative body to bring a halt to the Rule in the early 1980s. Pushed by competitive pressures, 31 states have either repealed the Rule or substantially amended it. Those amending the rule in most instances stretched the time property could be held.

The effect is to tie up real estate forever, which essentially prevents real property from being drawn into higher economic returns. That has a negative effect on economic growth.

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Professor Lewis Simes, a well-known legal scholar of his era, articulated two reasons for the Rule in contemporary society – “First, the Rule Against Perpetuities strikes a fair balance between the present generation, and similar desires of succeeding, to do what they wish with property which they enjoy. . . . In a sense this is a policy of alienability, but it is not alienability for productivity. It is alienability to enable people to do what they please at death with the property which they enjoy in life.” Simes goes on to state “But in my opinion, a second and even more important reason for the Rule is this. It is socially desirable that the wealth of the world be controlled by its living member and not by the dead.”<sup>3</sup>

I would add a third reason for preventing ownership forever – “it is an article of faith that economic growth is maximized if resources are subject to the forces and pressures of the market. Prices emanating from free, open and competitive markets are the best way to allocate resources and to distribute income if economic growth is to be maximized.”

Another factor is the large numbers of beneficiaries over time. A recent study calculated that if a couple with two children acquire property in 2017, with normal fertility levels, 500 years from

now, the two beneficiaries would have increased to 3.4 million individuals.

Finally, the issue of control is important. The property would likely be administered by some nearby city today. In 500 years, it might not even be administered on this planet.

### The key question

Do we want to place our economic system at risk with such a short sighted move?

### END NOTES

<sup>1</sup> Duke of Norfolk’s Case, 3 Ch. Cas. 1, 22 Eng. Rep. Case, 3 Ch. Cas. 1, 22 Eng. Rep. 931 (Ch. 1682) (the case concerned, Henry, the 22d Earl of Arundel, later the Duke of Norfolk).

<sup>2</sup> See Iowa Code §558.68(1) (2017).

<sup>3</sup> L.M. Simes, “The Policy Against Perpetuities,” *Univ. Of Penn. L. Rev.* 707 (1955). Available at [http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=7723&context=penn\\_law\\_review](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=7723&context=penn_law_review)

## CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

### BANKRUPTCY

#### GENERAL

**CONVERSION.** The debtor originally filed for Chapter 13 and had been paying on the Chapter 13 plan for two years before converting the case to Chapter 7. The Chapter 7 trustee moved to dismiss the case as abusive under Section 707(b). The trustee argued that the debtor’s disposable income exceeded the means test of 707(b)(2)(A)(i). Section 707(b)(1) provides that: “After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, . . . may dismiss a case filed by an individual debtor *under this chapter*. . . if it finds that the granting of relief would be an abuse of the provisions of this chapter.”[Emphasis added] The formula in Section 707(b)(2)(A)(i) provides that a presumption of abuse never arises where a debtor’s disposable monthly income is less than \$128.33; that it always arises if such income is more than \$214.17; and, if such income is within the range of \$128.33-\$214.17, the presumption arises only if the debtor’s non-priority unsecured debt exceeds a specific sum. The issue was whether the language in Section 707(b)(1) italicized above, refers to the original Chapter 13 petition or the conversion to Chapter 7. The court held that the Congressional intent of Section 707 was to limit the ability of debtors with sufficient income to avoid post-petition payments to creditors in Chapter 7. Thus, it was inconsistent with such intent to allow a Chapter 13 filer to circumvent the limitation by first filing in Chapter 13, which does not have a means-test, and then convert to Chapter 7 without meeting the Section 707 means-test. Thus, the court held that the debtor was prohibited from converting to

Chapter 7. *Pollitzer v. Gebhardt*, 2017 U.S. App. LEXIS 11394 (11th Cir. 2017), *aff’d unrep. D. C. dec. aff’d*, 2014 Bankr. LEXIS 4729 (Bankr. S.D. Fla. 2014).

### FEDERAL ESTATE AND GIFT TAXATION

**PORTABILITY.** The decedent died, survived by a spouse, on a date after the effective date of the amendment of I.R.C. § 2010(c), which provides for portability of a “deceased spousal unused exclusion” (DSUE) amount to a surviving spouse. The decedent’s estate did not file a timely Form 706 to make the portability election. The estate discovered its failure to elect portability after the due date for making the election. The estate represented that the value of the decedent’s gross estate was less than the basic exclusion amount in the year of the decedent’s death including any taxable gifts made by the decedent. The IRS granted the estate an extension of time to file Form 706 with the election. **Ltr. Rul. 201724002, June 19, 2017; Ltr. Rul. 201724003, June 19, 2017; Ltr. Rul. 201724004, June 19, 2017; Ltr. Rul. 201724011, June 19, 2017; Ltr. Rul. 201724014, June 19, 2017; Ltr. Rul. 201724019, June 19, 2017; Ltr. Rul. 201724020, June 19, 2017.**